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No. 92-451

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In The

Supreme Court of the United States

October Term, 1992

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Petitioners,

v.

CESAR A. PERALES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the district court have federal question jurisdiction over a claim that final INS legalization regulations violated the Immigration Reform and Control Act?

2. After finding that INS had implemented unlawful regulations throughout the whole of the INS designated application period, did the court have the authority to provide a remedy for that unlawful conduct?

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-451

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS,

v.

CESAR A. PERALES, ET AL. RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. The petition should be denied because there is no conflict in the circuits on the issues presented and the Second Circuit's decision comports with Supreme Court precedent.

THE PETITION'S ERRORS AND OMISSIONS

A. Omission of a District Court Decision.

The petitioners failed to include the district court's order of March 29, 1989 (App., *infra*, 1a - 7a) in which the court ruled against petitioners on the second question presented herein.

B. Omission and Misstatement of the Regulations Challenged.

The petition does not accurately describe the regulations challenged in this case. The petition sets forth in its appendix provisions labeled 8 C.F.R. § 245a.2(d)(4) (1988) and 8 C.F.R. § 245a.2(k)(4) (1988). These do not represent the regulations challenged in this case nor the regulations in effect in 1988.

The regulatory provisions challenged in this case were those in effect as of May 1, 1987, 52 Fed. Reg. 16205; 8 C.F.R. § 245a.1(i) (1987), 8 C.F.R. § 245a.2(d)(4) (1987) and 8 C.F.R. § 245a.2(k)(4) (1987). (App., *infra*, 7a-8a) These regulations were amended on November 17, 1987, 52 Fed. Reg. 43843 (App. *infra*, 10a-11a) and further amended on July 12, 1989, 54 Fed. Reg. 29442, 8 C.F.R. § 245 a.1(i) (1989), 8 C.F.R. 245a.2(d)(4) (1989) and 8 C.F.R. §245a.2(k)(4) (1989) (App., *infra*, 11a-12a). To correct petitioners' errors the applicable regulations are reproduced in Appendix B. They are not discussed in detail because the petitioners' do not contest the Second Circuit's holding that the regulations were unlawful. The Second Circuit's opinion provides a detailed, accurate explanation of these regulations and their regulatory history. *Perales v. Thornburgh*, 967 F.2d 798, 802-03, 808-11 (2d Cir. 1992).

STATEMENT

The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, created a one-time opportunity for undocumented aliens who lived "in a twilight, sub rosa society . . . vulnerable to exploitation" to legalize their status. 132 Cong. Rec. H9712-13 (Oct. 9, 1986) (Statement of Rep. Mazzoli). Congress intended

the amnesty application period to run for a full twelve months and to be "implemented in a liberal and generous fashion . . . to ensure true resolution of the problem and to ensure that the program will be a one-time only program " H.R. Rep. No. 99-682, Part 1, 99th Cong., 2d Sess. 71-73, *reprinted in* 1986 *U.S. Code Cong. & Admin. News* 5676-5677. It also implemented an employer sanctions program to prevent undocumented aliens in the U.S. from working in the future. 8 U.S.C. § 1324a.

Congress recognized that the legalization program could succeed only if INS overcame "the fear of prosecution or deportation [that] would cause many undocumented aliens to be reluctant to come forward and disclose their illegal status." *McNary v. Haitian Refugee Center*, 111 S. Ct. 888, 892 (1991). IRCA thus required that the Attorney General "broadly disseminate information" about legalization and its eligibility requirements beginning no later than the first day of the program. 8 U.S.C. § 1255a(i). INS's regulations required aliens to apply for temporary resident status -- the first phase of the legalization program -- between May 5, 1987 and May 4, 1988. 8 C.F.R. § 245a.2(a)(1) and set forth the eligibility criteria for legalization.

IRCA required that a legalization applicant show he was not likely to become a public charge, and stated that an applicant could show this by a history of self support. 8 U.S.C. § 1255a(d)(2)(B)(iii) (Supp. II 1990). Once the applicant showed that she met this and other eligibility criteria she had to be granted legalization. 8 U.S.C. § 1255a(a). The INS, however, implemented regulations that required more than self-support and also made the grant of legalization to a self-supporting alien discretionary. 8 C.F.R. §§ 245a.2(d)(4); 245a.1(i); 245a.2(k)(4); 52

Fed. Reg. 16211, 16208, 16212 (May 1, 1987). This case challenged these regulations as contrary to the statute.

Petitioners do not contest the Second Circuit's holding that these INS regulations violated IRCA.[1] In fact, INS admitted the unlawfulness of the regulations by changing them in 1989 after the INS designated application period closed. 54 Fed. Reg. 29448-29449 (July 12, 1989). Petitioners now assert only that the district court did not have the authority to decide whether the regulations comported with the statute and that, even if subject matter jurisdiction existed, the court did not have the authority to provide a remedy for INS implementation of unlawful regulations. Petition for a Writ of Certiorari, *Barr v. Perales*, 92-451 at 8 (hereinafter Perales Petition).

Respondents include individuals and a class[2] as well as the State and City of New York. The individuals are immigrant mothers and their U.S.

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[1] The same regulations challenged here were declared unlawful by a U.S. District Court in California and INS declined to appeal that ruling. *Zambrano v. INS*, Civ. No. 588-455 (E.D. Cal., July 31, 1989) *aff'd*, 972 F.2d 1122 (9th Cir. 1992).

[2] The class is composed of "(a) all undocumented aliens residing in New York State who may be excludable from the Legalization Program established by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1255A, as likely to become public charges based in whole or in part upon the receipt of public assistance by the applicants' U.S. citizen or legal permanent resident dependents, and (b) all undocumented aliens residing in New York State who either failed to apply for legalization by May 4, 1988, or who abandoned their applications, because they believed that they were ineligible on public charge grounds." First Amended Class Action Complaint, ¶ 28, *Perales v. Thornburgh*, S.D.N.Y., No. 88 Civ. 2265.

citizen children. These women lived in the U.S. since before 1982 and have been self-supporting. Their U.S. citizen children at one time had received some type of public assistance to which they were legally entitled. During the INS-designated time period for applications, INS regulations required legalization applicants to demonstrate not only a history of "self-support" -- as IRCA prescribed -- but also a history of support of U.S. citizen family members without any public assistance. Thus, the published INS regulations that were in force throughout the entire application period excluded these immigrant mothers from the legalization program.

Respondents commenced an action challenging these regulations while the legalization application period was still open. The INS responded to the lawsuit by claiming that it had internally modified its policy so that, contrary to the clear language of its published regulations, self-supporting aliens would *not* be disqualified from legalization on account of public benefit receipt by U.S. citizen family members. Respondents sought a temporary injunction requiring INS to disseminate this unpublished policy reversal while the application period was still open and class members could still file for legalization. The district court denied the application in reliance on INS' representation that "on or before April 19, 1988," INS would "promulgate to all regional and district legalization offices, and all [QDEs] throughout the nation, definitive instructions" that a child's receipt of welfare would not exclude a parent who shows self-support. *Perales v. Meese*, 685 F. Supp. 52, 53 (S.D.N.Y.), *aff'd*, 847 F.2d 55 (2d Cir. 1988). But, contrary to its representation to the district court, INS failed to tell New York legalization offices and QDEs about the policy change before

the application period closed. *Perales*, 967 F.2d at 804.

The district court denied respondents' motion for a preliminary injunction relying on INS's representation that it was "attempting to locate applicants who were erroneously excluded under the more restrictive 'public charge' standard." *Perales*, 685 F. Supp. at 53-54. INS later admitted, however, that it had no evidence of any INS effort to locate adversely affected class members. The court also found that there was no irreparable injury because the court's equitable powers would allow for late filings under appropriate circumstances. *Perales*, 685 F. Supp. at 54-55.

The district court denied cross-motions for summary judgment. The court rejected petitioners' claim that *INS v. Pangilinan*, 486 U.S. 875 (1988), barred relief. (App., *infra* 5a-6a) Respondents moved for reargument on the facial invalidity of the challenged regulations. The parties settled that motion by Stipulation and Order which required INS to publish amended regulations making clear that applicants need establish only self-support, not family support, to avoid exclusion as a public charge, and that a family member's receipt of public cash assistance is irrelevant to that determination. *Perales*, 967 F.2d at 804. *See*, 54 Fed. Reg. 29442, 29443 (July 12, 1989). In a decision after trial the district court determined that the INS regulations were not facially invalid nor unlawful as applied and that a federal court did not have authority to compel the INS to open the application period. *Perales v. Thornburgh*, 762 F. Supp. 1036 (S.D.N.Y. 1991).

The Second Circuit reversed. The court first addressed the issue of subject-matter jurisdiction, noting, however, that the petitioners had conceded

subject-matter jurisdiction in a letter to the district court. *Perales*, 967 F.2d at 805. The court found that 8 U.S.C. § 1255(a)(f)(1), (3) and (4) did not deprive the court of jurisdiction. The Second Circuit relied on this Court's decision in *McNary v. Haitain Refugee Center, Inc.*, 111 S. Ct. 888 (1991). The Second Circuit found that § 1255a(f)(1), (3) and (4) were identical to 8 U.S.C. §§ 1160(e)(1)-(3) which were at issue in *McNary* and that the *McNary* court found that these provisions applied "only to review of denials of individual . . . applications." *Perales*, 967 F.2d at 806 quoting *McNary*, 111 S. Ct. at 897.[3]

The Second Circuit also found that 8 U.S.C. § 1255a(f)(2) did not deprive the district court of jurisdiction. Again, the Second Circuit relied on the reasoning in *McNary* to find that § 1255a(f)(2) did not apply to a challenge to an INS regulation, only to denials of individual applications. The court found nothing in the plain language of the statute nor its legislative history to insulate from judicial review INS regulations that had "the effect of shortening or eliminating altogether the

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[3] The Second Circuit found "§ 1255 a(f)(4)'s requirement that judicial review be 'based solely on the administrative record' under an 'abuse of discretion' standard is inappropriate for review of statutory or constitutional claims which are generally reviewed de novo by the courts." *Perales*, 967 F.2d at 806. Further, the Second Circuit cited *McNary* to state that Congress could easily have used broader statutory language if it had intended to limit the review provisions to encompass a challenge to INS regulations. *Perales*, 967 F.2d at 806. Finally, the court found that a determination that the challenged regulation were unlawful would result not in an ultimate determination of eligibility, but rather only an opportunity to file timely applications which may or may not be filed and may or may not be denied. *Perales*, 967 F.2d at 806-807.

statutory application period." *Perales*, 967 F.2d at 807.

The Second Circuit then held that INS regulations violated IRCA in two respects. First, the regulations unlawfully converted a statutory entitlement into a discretionary benefit. Second, the regulations unlawfully demanded more from a legalization applicant than demonstration of self-support. Further, the court found that the INS disseminated the very aspects of the regulations which the court held unlawful. This unlawful conduct "eviscerated" the legalization application period. *Perales*, 967 F.2d at 808-11, 814.

Having found injury, the Second Circuit turned to the common remedy for unlawful agency action, injunctive relief. The court provided an opportunity to apply for legalization for aliens who could demonstrate they had been dissuaded from applying by INS' unlawful regulations. The court did not find anything in the case of *INS v. Pangilinan*, 486 U.S. 875 (1988) to prevent such a remedy. The court found the circumstances of *Pangilinan* distinguishable. Further, the court held that unlike the congressional purpose underlying the statute at issue in *Pangilinan*, the congressional purpose underlying IRCA could only be given effect by providing a remedy to applicants whose opportunity to apply had been eviscerated by unlawful INS conduct. *Perales*, 967 F.2d at 811-14.

Reasons for Denying the Writ

POINT I

CERTIORARI WAS IMPROVIDENTLY GRANTED IN *BARR V. CATHOLIC SOCIAL SERVICES, INC.* AND SHOULD BE DENIED IN THIS CASE.

A. Contrary to Petitioners' Assertion in CSS, There is No Conflict in the Circuits on the Issue of District Court Jurisdiction to Review Challenges to INS Legalization Regulations.

Petitioners assert that the writ should be granted in this case because it raises questions similar to those pending before the Court in *Barr v. Catholic Social Services, Inc.*, No. 91-1826 (hereinafter *CSS*). Perales Petition at 8. The basis for the petition for certiorari in *CSS* was the erroneous contention that there is conflict in the circuits on the issue of district court jurisdiction to review INS' legalization regulations. The *CSS* petition points to the case of *Ayuda, Inc. v. Thornbugh*, 948 F.2d 742 (D.C. Cir. 1991), *petition for cert. pending*, No. 91-1924, as being in conflict with the decision in *Catholic Social Services, Inc. v. Thornburgh*, 956 F.2d 914 (9th Cir. 1992), *cert. granted sub. nom., Barr v. Catholic Social Services, Inc.*, 112 S. Ct. 2990 (1992). *CSS* petition at 10. To the contrary, the decision of the D.C. Circuit denying rehearing *en banc* in *Ayuda* makes clear that there is no intercircuit conflict on the question presented here and in *CSS*: whether IRCA precludes general federal question jurisdiction over a claim that final INS legalization regulations violate that statute. *Ayuda, Inc. v. Thornburgh*, 958 F.2d 1089 (D.C. Cir. 1992).

Judge Silberman, joined by Judge Ginsburg authored the *Ayuda* panel decision relied upon by

CSS petitioners for their claim of intercircuit conflict.[4] In a separate opinion supporting the denial of rehearing *en banc*,[5] Judge Silberman, again joined by Judge Ginsburg, concluded that there is *no* "intercircuit dispute" on the question of subject-matter jurisdiction to review INS regulations. He noted that the Seventh Circuit in *Morales v. Yeutter*, 952 F.2d 954 (7th Cir. 1991), had upheld district court jurisdiction to review formal final INS legalization regulations as had the Ninth Circuit in *CSS*. Judge Silberman distinguished *Morales* and *CSS* on the ground that *Ayuda* did not involve a challenge to "formal (and final) regulations." *Ayuda*, 958 F.2d at 1093. Judge Posner drew this same distinction in *Morales*, 952 F.2d at 957. Thus, three circuits -- the Second, Seventh, Ninth -- agree that the district courts have subject-matter jurisdiction over challenges to INS legalization regulations and the D.C. Circuit has expressed no disagreement.

B. There is No Conflict in the Circuits on the Issue of Judicial Authority to Remedy Unlawful INS Action.

Similarly, there is no intercircuit conflict on the second question presented by petitioners: whether the federal judiciary can provide a remedy for INS'

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[4] The *Ayuda* panel had decided, on the alternative grounds of lack of either ripeness or subject matter jurisdiction, that the district court could not consider the contention that INS misinterpreted the legalization statute by failing to recognize persons who had not filed a particular form as "known to the government." The plaintiffs had argued that this failure was a challengable INS practice. *Ayuda*, 948 F.2d at 745, 754.

[5] The D.C. Circuit denied a hearing en banc per curiam, with five members in favor of granting rehearing. Judges Wald and Williams pointed to the lack of ripeness holding as the basis for the Circuit's decision to deny rehearing en banc, *Ayuda*, 958 F.2d at 1090, 1093.

illegal administration of the legalization program. The Second Circuit and three panels of the Ninth Circuit have answered this question in the affirmative. *Perales*, 967 F.2d at 811-14; *Legalization Assistance Project v. INS*, ___ F.2d ___ (9th Cir. Sept. 18, 1992) (1992 WL 232145); *CSS*, 956 F.2d at 919-921; *Zambrano*, 972 F.2d at 1124. The D.C. Circuit, in *Ayuda*, did not reach this issue. *Ayuda*, 948 F.2d at 756.

There being no intercircuit conflict on either issue presented, certiorari was improvidently granted in *CSS* on that basis and should not be granted here. *See, Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 at 392-93 (1923). *See also*, Supreme Court Rule 10.1(a).

C. The Circuit Court Rulings in This Case and CSS Are Completely Consistent With Supreme Court Precedent.

As this Court reaffirmed only two terms ago, there is a "well-settled presumption" allowing judicial review of agency action. *McNary*, 111 S. Ct. at 898; *see also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). The circuit courts' determinations in this case and *CSS* that subject-matter jurisdiction exists for challenges to agency regulations violative of federal statutes is fully consistent with this Court's precedent. *See, e.g., Bowen*, 476 U.S. 667; *Morales v. Yeutter*, 952 F.2d 954, 957 (7th Cir. 1991).

Petitioners' position, on the other hand, is completely contrary to the norm of effective and fair judicial review of whether agency regulations comply with a statute. In this case, petitioners' position would allow the INS to prevent any judicial review of its admitted unlawful action and therefore to violate the law with impunity.

According to petitioners' position any judicial consideration of whether agency regulations comport with the statute would depend entirely on whether the INS affirmatively decided to initiate a deportation proceeding.

The consequences of this position for the respondent alien mothers and their citizen children would be devastating. The mothers would be subject to deportation and foreclosed access to lawful employment. *See, McNary*, 111 S. Ct. at 891, 895. Their citizen children would be doomed to perpetual welfare dependency and either the oppressive underground life of their undocumented parents or total deprivation of their parents. As this Court found in *McNary*, such a scenario is tantamount to complete denial of judicial review. *McNary*, 111 S. Ct. at 898.

Further, under petitioners' position, even if INS did initiate a deportation proceeding, the issue of whether the regulations comport with the statute would be forced through components of the agency that have no authority to determine that issue. After such costly inefficient and useless delay the Court of Appeals would confront the issue without the benefit of district court consideration. Moreover, the court's determinations could not occur within the one year time period set for legalization, thus assuring that the judiciary would not have an effective, meaningful voice in stating what a statute means. This is "the practical equivalent of total denial of judicial review" of statutory claims. *McNary*, 111 S. Ct. at 898.

Additionally, the circuit court rulings in *CSS* and this case on the relief issue, fully comport with IRCA and this Court's precedents. Petitioners sought *certiorari* in *CSS* on the assertion that the Ninth Circuit's allowance of a judicial remedy there conflicts with "this Court's analysis in [*INS v.*]

Pangilinan," 486 U.S. 875 (1988). CSS Petition at 20. Subsequent to the government's petition in *CSS*, the Second Circuit issued its decision in *Perales*, holding that nothing in IRCA or *Pangilinan* strips the federal judiciary of its traditional power to remedy agency violations of federal law. *Perales*, 967 F.2d at 811-14. *See, Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986) (noting the settled presumption that Congress "expects the courts to grant relief when an executive agency violates [a statutory] command").[6] The Second Circuit's discussion of the issue convincingly refutes the arguments asserted in the *CSS* petition and should be reviewed by this Court before proceeding to plenary consideration in *CSS*. *Perales*, 967 F.2d at 811-14.

In essence, petitioners' contention is that *Pangilinan* indiscriminately bars judicial relief in any case involving an immigration statute and a filing deadline.[7] This proposition is illogical, since in the name of deference to Congress, it would prohibit judicial relief even where such relief *advances* congressional intent. As the Second Circuit rightly concluded, *Pangilinan* simply does not posit such an extreme and irrational rule. Rather, in *Pangilinan*, this Court carefully determined Congress' intent with respect to the statutes at issue and gave effect to that intent.

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[6] As noted above, petitioners have now conceded that INS violated federal law in its administration of the legalization program.

[7] Petitioners asserted that *Pangilinan* is "on all fours with" *CSS*. CSS Petition at 17. But the underlying statutes in the two cases -- the Naturalization Act of 1940, as amended, and IRCA -- bear no resemblance to one another with respect to legislative mandate, policy or intent.

Thus, there is no credible claim that the Second and Ninth Circuits failed to abide by *Pangilinan*, since the teaching of that decision is that congressional intent controls. This Court's only statement on the congressional intent behind IRCA appears in *McNary*, which reaffirmed that Congress intended to create a "broad," remedial legalization program. *McNary*, 111 S. Ct. at 890-92 & nn 4-5. Consistent with *McNary*, both the Second and Ninth Circuits concluded that Congress did not intend to bar traditional judicial remedies for those injured by INS' violations of federal law. *Perales*, 967 F.2d at 812-14; *CSS*, 956 F.2d at 921-23. Nothing in IRCA, and no decision of this Court is remotely to the contrary.

POINT II

IF THIS COURT RULES FOR PETITIONERS IN CSS, THERE ARE OUTSTANDING ISSUES IN THIS CASE WARRANTING A REMAND TO THE SECOND CIRCUIT.

The petitioners state that the Second Circuit's decision in this case should be reversed if this Court determines that the court in *CSS* did not have authority to determine whether an INS regulation comported with IRCA. Perales Petition at 8. If this Court makes such a determination in *CSS*, the *Perales* case should not be reversed, rather it should be remanded to the Second Circuit.

There were several claims the Second Circuit did not address in this case. *Perales v. Thornburgh*, 967 F.2d at 814. The first is plaintiffs' constitutional challenge to INS' regulations and administration of IRCA. Petitioners concede that the presumption in favor of judicial review of constitutional claims is even stronger than the presumption in favor of review of statutory claims.

Brief for Petitioners, *Barr v. CSS*, No. 91-1826 p. 20. *See, e.g., Johnson v. Robison*, 415 U.S. 361, 373-374 (1974).

Further the Second Circuit did not consider the plaintiffs' APA claims or their challenge to INS' dissemination policies. The claim in this case that INS violated IRCA by its dissemination policies and practices fits squarely into *McNary* even under the *Ayuda* court's assertion that *McNary* addressed only claims that did not focus on eligibility criteria. *Ayuda*, 948 F.2d at 753. Therefore, even if this Court finds there was no subject-matter jurisdiction in *CSS*, it should remand this case to the Second Circuit.

Also, if this Court agrees with petitioners that in *CSS* the Ninth Circuit lacked authority to provide an opportunity for legalization applicants to file applications after the INS-imposed deadline, this case should be remanded to the Court of Appeals for the Second Circuit. The Second Circuit based its remedy decision on only one of the claims made and the specific facts of the *Perales* case as applied to that one claim. The other claims and the appropriate remedies would have to be assessed. In particular, respondents' constitutional claims stand on a different footing from the statutory claims in *CSS*, since federal judicial authority to remedy legal wrongs is at its height where constitutional rights have been abridged. *See, Pangilinan*, 486 U.S. at 885-886 (separately analyzing constitutional claims after concluding that Congress intended to foreclose relief for alleged statutory violations). Therefore, remand and not reversal would be appropriate.

If this Court affirms the *CSS* determinations on subject matter-jurisdiction and remedy, the decision in this case should be affirmed or the writ denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 29, 1992

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CESAR PERALES, et. al.,
Plaintiffs,

-and-

LINDA LOE, SUSAN SOE, MARY MOE, FRAN FOE, and ZELDA ZOE, individually, on behalf of their minor children, and on behalf of all others similarly situated and their minor children,
Plaintiff-Intervenors,

-v-

EDWIN MEESE, III, et al.,
Defendants.

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88 Civ. 2265 (KC)

MEMORANDUM AND ORDER

Kenneth Conboy, District Judge:

I. CLASS CERTIFICATION

Plaintiffs seek certification of a class composed of:

> [a]ll undocumented aliens residing in New York State who may be excludable from the Legalization Program established by IRCA as "likely to become public charges" under the standards set forth in INS regulations 8 C.F.R. §§ 245a.1 (i), 245a.2(d) (4) and 245a.2(k) (4) based in whole or in part upon the receipt of public cash assistance by the applicant's U.S. citizen or legal permanent resident family members, including but not

> limited to those individuals who were deterred from filing applications for legalization under the Legalization program.

(complaint ¶ 15 at 8-9). Most of the factors asserted by plaintiffs in support of class certification are not challenged by defendants and need only be discussed briefly.

23(a)

NUMEROSITY

Plaintiffs' reasonable estimates about the size of the class, as well as the class's relative isolation and dispersement, indicate that joinder is impractical.

COMMONALTY

There is at least one question of law common to all proposed class members. That is whether, as undocumented aliens whose family members receive public cash assistance, they were subject to unduly restrictive eligibility regulations. Furthermore, each class member was confronted with the same allegedly deficient dissemination efforts on the part of the Immigration and Naturalization Service ("INS").

TYPICALITY

Defendants' most significant objections are (or should be) directed at the atypicality of the proposed class representatives. They argue that each proposed class member's right to relief will depend on unique facts, the most important of which is the class member's subjective state of mind. In addition to potential differences in the effect of the government's actions or inactions on each class member's state of mind, there will likely be differences between the exact information each class member received; the source of such

information (e.g. from the regulations themselves, from government officials, or from third parties); if received from a third party, whether the information was misstated; and the extent of the class member's efforts to obtain accurate information. While the existence and extent of an individual class member's reliance on erroneously or inadequately disseminated information, as well as the extent of the class member's efforts to obtain accurate information, may affect his or her right to relief, it does not mean that class certification is inappropriate. Where, as here, the proposed representatives' claims arise from the same course of conduct and are based on the same legal theories, unique defenses or individual fact differences do not render the proposed representatives' claims atypical. 1 H. Newberg, On Class Actions, §§ 3.13 to 3.16 (2d ed. 1985); see also In re Am International, Inc. Securities Litigation, 108 F.R.D. 190, 194 (S.D.N.Y. 1985) (fact that individualized questions of reliance in securities fraud action may exist is not sufficient to defeat class certification). If necessary, separate trials can be held on issues that require individualized treatment.

ADEQUACY OF REPRESENTATION

Plaintiffs are represented by experienced and resourceful counsel and the plaintiffs have no apparent conflicts with other potential class members. Accordingly, the Court finds that the named plaintiffs will adequately represent the class.

23(b)

Certification is clearly appropriate under 23(b) (2). Plaintiffs seek declaratory and injunctive relief arising out of the government's actions and inactions in its promulgation and dissemination of eligibility standards under IRCA. In effect, this lawsuit involves allegations that the government has acted or refused to act on grounds generally applicable to the proposed class. Accordingly, class certification is granted.1

II. SUMMARY JUDGMENT

Plaintiffs move for partial summary judgment, seeking a ruling that 1) defendants' "public charge" regulations facially violate IRCA and the Equal Protection component of the Fifth Amendment 2) defendants' failure to disseminate accurate eligibility standards to the public and their issuance of regulations that were at best ambiguous and misleading violate IRCA and the Fifth Amendment, and 3) that equitable tolling of the May 4 deadline (or similar relief) will be available to those class members who can demonstrate that they were deterred from applying for legalization by defendants' illegal policies. The defendants oppose the motion in all respects and cross-move for summary judgment, seeking a ruling that a) the public charge regulations are legal and were properly and clearly disseminated, and b) the Court has no power to grant the type of relief sought, regardless of the merits of the claims, in light of the expiration of the amnesty period on

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1 Defendants also contend that the governmental plaintiffs lack parens patriae standing to maintain this action. Because at least one of the individual plaintiffs has standing, it is unnecessary to consider this issue. See Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264 n.9 (1977).

May 4, 1988. The Court will deal with this last contention first.

In arguing that the Court has no power to extend the application period, regardless of the merits of plaintiffs' attack on the INS's administration of the legalization program, defendants rely principally on INS v. Pangilinan, 108 S. Ct. 2210 (1988). Although the parameters of the Court's power to grant the type of relief sought here is by no means clear, I do not accept the broad reading of Pangilinan asserted by defendants. In this regard, the Court concurs with the reasoning of League of United Latin American Citizens v. INS, No. 87 Civ. 4457 slip op. (C.D. Cal., Aug. 12, 1988). I would add only a few brief points. Contrary to defendants' assertion the Pangilinan Court must have concurred in the Ninth Circuit's finding that the statute at issue there had been violated, the clear import of the opinion was that the challenged actions were at all times consistent with congressional intent. Not only was there no specific statutory mandate to maintain a naturalization officer in the Philippines during the relevant period, but, as the Court observed, non citizen Filipino servicemen fared better on balance in the implementation of the 1942 amendments to the Nationality Act than non citizen servicemen from other parts of the world. Here, in contrast, it is alleged that the INS violated specific congressional mandates by promulgating unduly restrictive regulations and inadequately and/or misleadingly disseminating information about the same. It is also significant that Pangilinan separately discussed two constitutional attacks on the implementation of the 1942 amendments after ruling that the courts had no power to confer citizenship in violation of clear congressional policy. If the Court were positing a

per se rule that the expiration of an application cut-off date absolutely precludes judicial remedies, regardless of the theory supporting relief, it would have been simpler and more logical to avoid any discussion of the merits of the plaintiffs' claims. Finally, as the Court reasoned, it would have been absurd to conclude that consideration of applications under the 1942 amendments, filed 30 years after the deadline, would be consistent with congressional intent when Congress enacted subsequent legislation that effectively led to the denial of citizenship to Filipinos who filed timely applications under those amendments.

As to the remaining issues, the Court declines to grant summary judgment for either side. Although the complexity and importance of a case is not in all instances an obstacle to summary adjudication, I find that the circumstances here favor forbearance until a full record is developed on all material issues. Cf. Kennedy v. Silas Mason co., 334 U.S. 249 (1948); McWhirter Distributing, Co. v. Texaco, Inc., 668 F.2d 511 (1981); Elliot v. Elliot, 49 F.R.D. 283 (S.D.N.Y. 1970).

III. INTERVENTION

The motion for intervention is granted.

SO ORDERED

Dated: New York, New York
March 29, 1989

Kenneth Conboy, U.S.D.J.

APPENDIX B

8 C.F.R. §245a.2(d)(4), 52 Fed. Reg. 16211 (May 1, 1987)

(4) *Proof of financial responsibility.* An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges unless the applicant demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance. Generally, the evidence of employment submitted under paragraph (d)(3)(i) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is likely to become a public charge will be denied adjustment. the burden of proof to demonstrate the inapplicability of this provision of law lies with the applicant

8 C.F.R. §245a.1(i), 52 Fed. Reg. 16208 (May 1, 1987)

(i) "Public cash assistance" means income or needs-based monetary assistance, to include but not limited to supplemental security income, received by the alien or his or her immediate family members through federal, state, or local programs designed to meet

subsistence levels. It does not include assistance in kind, such as food stamps, public housing, or other non-cash benefits, nor does it include work-related compensation or certain types of medical assistance (Medicare, Medicaid, emergency treatment, services to pregnant women or children under 18 years of age, or treatment in the interest of public health).

8 C.F.R. §245a.2(k)(4), 52 Fed. Reg. 16212 (May 1, 1987)

(4) *Special rule for determination of public charge.* An alien who has a consistent employment history which shows the ability to support himself and his or her family, even though his income may be below the poverty level, may be admissible under paragraph (k)(2) of this section. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income and maintain his or her family without recourse to public cash assistance. This regulation is prospective in that the Service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. the weight given in considering applicability of the public charge provisions will depend on may factors, but the length of time an applicant has received public cash assistance will constitute a significant factor.

8 C.F.R. §245a.2(k)(2), 52 Fed. Reg. 16212 (May 1, 1987)

(2) Waiver of grounds of exclusion. Except as provided in paragraph (k)(3) of this section, the Attorney General may waive any other provision of section 212(a) of the Act only in the case of individual aliens for humanitarian purposes, to assure family unity, or when the granting of such a waiver is in the public interest. If an alien is excludable on grounds which may be waived as set forth in this paragraph, he or she shall be advised on the procedures for applying for a waiver of grounds of excludability on Form I-690. When an application for waiver of grounds of excludability is filed jointly with an application for temporary residence under this section, it shall be accepted for processing at the legalization office. If an application for waiver of grounds of excludability is submitted after the alien's preliminary interview at the legalization office, it shall be forwarded to the appropriate Regional Processing Facility. All applications for waivers of grounds of excludability must be accompanied by the correct fee in the exact amount. All fees for applications filed in the United States must be in the form of a money order, cashier's check, or bank check. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances. An application for waiver of grounds of excludability under this part shall be approved or denied by the director of the Regional Processing Facility in whose jurisdiction the applicant's application for adjurstment of status was filed except that in cases involving clear statutory ineligibility or admitted fraud, such application may be denied by the district

director in whose jurisdiction the application is filed, and in cases returned to a Service Legalization Office for re-interview, such application may be approved at the discretion of the district director. The applicant shall be notified of the decision and, if the application is denied, of the reason therefor. Appeal from an adverse decision under this part may be taken by the applicant on Form I-694 within 30 days after the service of the notice only to the Service's Administrative Appeals Unit pursuant to the provisions of § 103.3(a) of this chapter.

8 C.F.R. §245a.2(k)(4), 52 Fed. Reg. 43844 (Nov. 17, 1987)

(4) *Special rule for determination of public charge.* An alien who has a consistent employment history which shows the ability to support himself and his or her family, even though his income may be below the poverty level, may be admissible. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income and maintain his or her family without recourse to public cash assistance. This regulation is prospective in that the Service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. the weight given in considering applicability of the public charge provisions will depend on may factors, but the length of time

an applicant has received public cash assistance will constitute a significant factor.

8 C.F.R. §245a.2(d)(4), 54 Fed. Reg. 29449 (July 12, 1989)

(4) *Proof of financial responsibility.* An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges. generally, the evidence of employment submitted under paragraph (d)(3)(i) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is determined likely to become a public charge and is unable to overcome this determination after application of the special rule will be denied adjustment. The burden of proof to demonstrate the inapplicability of this provision of law lies with the applicant who may provide.

8 C.F.R. §245a.1(i), 54 Fed. Reg. 29448 (July 12, 1989)

(i) "Public cash assistance" means income or needs-based monetary assistance to include, but not limited to, supplemental security income received by the alien through federal, state, or local programs designed to meet subsistence levels. It does not include assistance in kind, such as food stamps, public

housing, or other non-cash benefits, nor does it include work-related compensation or certain types of medical assistance (Medicare, Medicaid, emergency treatment, services to pregnant women or children under 18 years of age, or treatment in the interest of public health).

8 C.F.R. §245a.2(k)(4), 54 Fed. Reg. 29449 (July 12, 1989)

(4) *Special rule for determination of public charge.* An alien who has a consistent employment history which shows the ability to support himself or herself even though his or her income may be below the poverty level, may be admissible. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income without recourse to public cash assistance. This regulation is prospective in that the Service shall determine, based on the alien's history whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors; but the length of time an applicant has received public cash assistance will constitute a significant factor.